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Supreme Court, U.S.
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In The Supreme Court of The United States

LINKCO, INC.,

Petitioner,

v.

NAOYUKI AKIKUSA AND FUJITSU LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID A. NOVOSELSKY
Counsel of Record
NOVOSELSKY LAW OFFICES
120 North LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 346-8930
dnovo@novoselsky.com

Counsel for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

Whether this Court should review, and ultimately, reverse the decision of the Court of Appeals for the Second Circuit that held the plaintiff's allegations the defendant and the defendant's counsel knowingly presented false evidence, obstructed discovery, and withheld documentary evidence nonetheless did not constitute a "fraud on the court" so as to warrant relief under Fed.R.Civ.Pro. 60(d)(3). The Second Circuit and other Circuits have held the participation of a party's counsel transforms the matter from the so-called "ordinary" fraud by a litigant to the far more serious issue of a fraud on the court, which implicates the very integrity of the judicial system itself.

Whether this Court should review, and ultimately, reverse the decision of the Court of Appeals for the Second Circuit that applied the doctrine of laches to bar a claim for relief under Fed.R.Civ.Pro. 60(d)(3) on the basis of a fraud on the court. The Second Circuit now stands in direct conflict with other Circuits that have held laches does not apply to such claims.

CORPORATE DISCLOSURE STATEMENT

Plaintiff LinkCo, Inc. is a Delaware corporation. There is no parent corporation. No publicly held company owns more than 10% of its stock.

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The citation for the decision of the District Court granting the defense motion to dismiss is 615 F. Supp. 2d 315 (S.D.N.Y. 2009), and is contained in pages 7-38 of the Appendix. The order of the United States Court of Appeals affirming the District Court is not reported and is contained in pages 1-6 of the Appendix.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals was issued on Monday, February 22, 2010. Ninety days after this date is Sunday, May 23, 2010, so the deadline to file the petition is extended to Monday, May 24, 2010. This petition is filed on May 24, 2010, and therefore this Court has jurisdiction under 28 U.S.C. § 2101(c). Supreme Court Rule 11 does not apply.

RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 60 states as follows:

> (a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal

has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.
(c) Timing and Effect of the Motion.
(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable

time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to: (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655; to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

BASIS FOR JURISDICTION IN THE COURT OF APPEALS

Plaintiff LinkCo, Inc. is a Delaware corporation with its principal place of business in Illinois. Defendant Fujitsu, Ltd. is a Japanese corporation with its principal place of business in Japan. Defendant Naoyuki Akikusa is an individual and is a citizen of Japan.

Plaintiff filed suit in the United States District Court for the Southern District of New York. Plaintiff sought relief under Fed.R.Civ.Pro. 60(d) and the amount in controversy exceeded $75,000. The district court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).

On Thursday, March 12, 2009, the District Court granted Fujitsu's motion to dismiss. On this date the District Court also dismissed plaintiff's claims against defendant Akikusa. This judgment was final and appealable pursuant to 28 U.S.C. § 1291. Plaintiff timely filed a notice of appeal on Monday, April 13, 2009, within the thirty day time period set forth in Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF FACTS

In 2000, plaintiff LinkCo, Inc. filed suit against defendant Fujitsu, Ltd. in the United States District Court for the Southern District of New York. LinkCo alleged misappropriation of trade secrets and unfair competition. Two of the central issues in the case were the nature of LinkCo's damages and the date of the misappropriation. The District Court held LinkCo was entitled to a reasonable royalty and that only those revenue projections made by Fujitsu on or before the date of misappropriation would be admissible to prove LinkCo's damages.

This latter ruling is significant, because on January 20, 1998, a meeting of Fujitsu personnel was held in which international marketing plans

were discussed for the information that Fujitsu misappropriated from LinkCo. Revenue projections were also discussed at this meeting, and these projections were in excess of $500 million, LinkCo was not provided with any information regarding what was discussed at this meeting. Indeed, LinkCo did not even know the meeting had occurred. To the contrary, Fujitsu and its attorneys represented that there was a meeting on November 20, 1997, but again, the revenue projections were concealed. Fujitsu also maintained the information allegedly misappropriated from LinkCo was intended for marketing inside Japan only.

The case was tried in November of 2002, and the jury awarded LinkCo $3.5 million. The jury found the misappropriation occurred at the meeting of November 20, 1997. LinkCo and Fujitsu executed a settlement agreement in April of 2003, and the case was dismissed. However, LinkCo still did not know of the January 20, 1998 meeting, nor did LinkCo know of the $500 million revenue projections discussed at this meeting.

LinkCo certainly would not have settled the case if LinkCo had known of the meeting of January 20, 1998, or if LinkCo had known of the $500 million revenue projections discussed at that meeting. The District Court stated LinkCo was entitled to recover as damages a "reasonable royalty," and obviously the verdict amount of $3.5 million, let alone the lesser settlement amount, is not a "reasonable royalty" for revenues of $500 million.

LinkCo later discovered information that led LinkCo to investigate whether it had been victimized by a massive cover-up and concealment of the true nature of Fujitsu's conduct. LinkCo eventually obtained the computer of a key witness, and after a time-consuming, laborious and painstaking reconstruction of the data on this hard drive, and only in conjunction with LinkCo's discussions with various witnesses, and LinkCo's investigation into the technological means by which the cover-up was perpetrated, LinkCo ultimately uncovered the hard evidence of the fraud committed by Fujitsu and Fujitsu's attorneys.

Accordingly, and in October of 2008, LinkCo filed the instant action in the United States District Court for the Southern District of New York, and ultimately filed a second amended complaint. This second amended complaint alleged Fujitsu and its attorneys engaged in a massive scheme to prevent false evidence, tamper with evidence, withhold documents, prevent the discovery of the existence of documents, and otherwise prevent LinkCo from learning the true extent of Fujitsu's' misappropriation and unfair competition. The complaint stated at page 2 that "Fujitsu bolstered its lies with doctored documents, the withholding of critical contrary evidence and witnesses, and false witness testimony that was fully coordinated by Fujitsu, its CEO, its Board of Directors, its attorneys, and even its outside litigation support staff."

Paragraph 26 of the second amended complaint alleged that Fujitsu's trial counsel in the misappropriation case, one Richard O'Brien, exchanged emails with a witness before the trial started, one Kiyoto Kanda, and based upon these emails, O'Brien knew the meeting of November 20, 1997 actually occurred on January 20, 1998. Paragraph 26 also alleges O'Brien and Kanda met shortly before the trial started and O'Brien provided Kanda with various documents regarding Fujitsu's international marketing plans for the information misappropriated from LinkCo.

Fujitsu filed a motion to dismiss for failure to state a claim. The District Court granted the motion, holding the second amended complaint alleged fraud upon a litigant rather than a fraud on the court that would allow for relief under Fed.R.Civ.Pro. 60(d)(3). The District Court also held LinkCo should have known of the alleged fraud several years before it filed suit, such that the doctrine of laches barred the suit. The Court of Appeals affirmed, agreeing with the District Court's findings the second amended complaint did not allege a fraud on the court and the case was barred by laches.

SUMMARY OF ARGUMENT

This is a case where David actually beat Goliath, with David only later realizing the victory was hollow because Goliath had lied and concealed the truth. When David returned to federal court to obtain the Justice so cruelly denied, the courthouse doors were slammed shut. Enough is enough. It is

time for righteousness to prevail over the bare-knuckled abuse of power by a multi-national corporation.

LinkCo, a tiny United States company, took on Fujitsu, a mammoth international corporation, and won a unanimous jury verdict that Fujitsu misappropriated LinkCo's trade secrets. Fujitsu and Fujitsu's attorneys compounded that underlying misappropriation by presenting false evidence and concealing the truth, all in the name of vastly understating the true extent of LinkCo's damages. In short, the trial was rigged, and Fujitsu and Fujitsu's attorneys duped LinkCo and the District Court into thinking the trial was a meaningful exercise. Only after the serendipitous discovery on a reconstructed hard drive on the damning proof of the deception did LinkCo discover the massive extent of the fraud on the court committed by Fujitsu and Fujitsu's attorneys.

The judicial system derives its authority and legitimacy on the principle of the blind pursuit of Justice. For this reason, fraud perpetrated by the attorney for a party has routinely been held a sufficient basis to seek relief under Fed.R.Civ.Pro. 60(d)(3) for a fraud on the court. LinkCo's allegations of fraud by Fujitsu's attorneys in concealing evidence and presenting false evidence constitute fraud on the court, and consequently the Court of Appeals erroneously affirmed the dismissal of LinkCo's second amended complaint.

Nor does the doctrine of laches apply to LinkCo's claim of fraud on the court by Fujitsu and Fujitsu's attorneys. This rule, which has been adopted by other Circuits, is based on the common sense principle that the courts will not allow a party who has committed fraud to seek refuge in a defense that itself is based upon fairness and good faith. Again the Court of Appeals erroneously affirmed the dismissal of LinkCo's second amended complaint.

ARGUMENT

I. LinkCo Sufficiently Alleged A Fraud On The Court

Fed.R.Civ.Pro. 60(d)(3) states "this rule does not limit a court's power to: . . . (3) set aside a judgment for fraud on the court." As even the Second Circuit has held, fraud perpetrated by an attorney for a party constitutes a fraud on the court. "The concept of 'fraud on the court' embraces only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995).

The notion that fraudulent conduct by an attorney for a party constitutes a fraud on the court is well-settled. *See, e.g., Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009) ("fraud on the court consists of conduct: 1) on the part of an officer of the court"); *Genesys Data Technologies v. Genesys*

Pacific Technologies, 204 F.3d 124, 130 (4th Cir. 2000) ("fraud on the court includes fraud by bribing a judge, or tampering with a jury, or fraud by an officer of the court, including an attorney").

Here, LinkCo's second amended complaint contained sufficient allegations to establish a fraud on the court committed by Fujitsu and Fujitsu's attorneys. The second amended complaint alleged Fujitsu's trial counsel exchanged emails with a witness, and from these emails Fujitsu's trial counsel knew the meeting of November 20, 1997 actually occurred on January 20, 1998. The second amended complaint further alleges Fujitsu's trial counsel met with this same witness and provided the witness with documents that proved Fujitsu intended to market the misappropriated information internationally. Yet Fujitsu's attorney never provided this information to LinkCo.

In other words, Fujitsu's attorneys not only knowingly hid the truth from LinkCo and the District Court, but Fujitsu's attorneys also knowingly presented false information to LinkCo and the District Court, all as part of a concerted and orchestrated campaign to minimize the extent of LinkCo's recoverable damages. Again, the District Court stated LinkCo was entitled to recover as damages a "reasonable royalty," and obviously the verdict amount of $3.5 million, let alone the lesser settlement amount, is not a "reasonable royalty" for revenues of $500 million.

LinkCo's allegations easily meet each of the definitions of "fraud on the court" cited above. Fujitsu's attorneys tried the underlying misappropriation case under what the attorneys knew to be false information regarding the date of the meeting and the scope of Fujitsu's marketing intentions. By means of this fraudulent conduct, Fujitsu's attorneys made sure the judicial machinery could not perform in the usual manner its impartial task of adjudging cases. The trial was a farce, in that Fujitsu was never in any real danger of being forced to fully and fairly compensate LinkCo.

LinkCo's allegations strike to the very heart of the integrity of the judicial system, and the need for that system to command and hold the respect of the citizenry it is supposed to protect. The decision of the Court of Appeals herein inexplicably overlooked LinkCo's allegations of fraud on the court committed by Fujitsu's attorneys. This Court should accept this petition and reaffirm the principle that justice will be served to those who have been victimized by fraud perpetrated by an attorney for a party.

II. Laches Does Not Apply To A Claim Of Fraud On The Court

The Court of Appeals also held the doctrine of laches barred LinkCo's claims for relief from the fraud on the court perpetrated by Fujitsu and Fujitsu's attorneys. However, the Court of Appeals overlooked that other Circuits have held laches does not apply to claims for relief due to a fraud on the court. *See, e.g., United States v. Buck*, 281 F.3d

1336, 1341-42 (10th Cir. 2002) (in a claim of fraud on the court, "there is no time limit for such proceedings, nor does the doctrine of laches apply"); *In Re Whitney-Forbes, Inc.*, 770 F.2d 692, 698 (7th Cir. 1985) ("actions to set aside a judgment or order for fraud on the court are not barred by laches").

The reason laches should not apply to claims for relief from a fraud on the court is simple. "The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abettor of iniquity." *Bain v. Heath*, 47 U.S. 228, 247, 6 How. 228 (1848). *See also Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F. Supp. 969 (S.D.N.Y.) *aff'd*, 983 F.2d 1048 (2d Cir. 1992) (holding the unclean hands doctrine barred the defendant's reliance on the defense of laches when the defendant gave false testimony in a previous case that was directly related to the laches defense).

In this case, Fujitsu and Fujitsu's attorneys are the wrongdoers, and the victims are LinkCo and the judicial system as a whole. The underlying trial was rigged and its outcome was predetermined, all by the fraudulent conduct of Fujitsu and Fujitsu's attorneys. It heaps insult upon injury, and makes a mockery of the maxim that the courts exist to see that justice is done, for Fujitsu to have been allowed to invoke an equitable doctrine to block judicial scrutiny of its own fraudulent conduct. This Court should allow LinkCo's petition and allow LinkCo its

day in court to hold Fujitsu and Fujitsu's attorneys accountable for their fraudulent conduct.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court grant its petition and allow review of this matter.

Respectfully submitted,

David A. Novoselsky
dnovo@novoselsky.com
NOVOSELSKY LAW OFFICES
120 North LaSalle Street, Suite 1400
Chicago, IL 60602
(312) 346-8930

United States Court of Appeals,
Second Circuit.

Slip Copy, 2010 WL 605739 (C.A.2 (N.Y.))

LINKCO, INC., a Delaware Corporation
Plaintiff-Appellant,

v.

NAOYUKI AKIKUSA, Individually,
Fujitsu Limited, a Japanese Corporation,
Defendants-Appellees.

No. 09-1551-cv.

Appeal from the United States District Court for the Southern District of New York (Shira A. Scheindlin, Judge).Steven K. Fedder (Shannon A.S. Knox, on the brief), Leitess Leitess Friedberg & Fedder P.C., Owings Mills, MD, for Appellant.

Richard J. O'Brien (Paul E. Veith, Sidley Austin LLP, Chicago, IL, Timothy J. Treanor, Michael D. Mann, Sidley Austin LLP, New York, NY, on the brief), Sidley Austin LLP, Chicago, IL, for Appellee.

Present GUIDO CALABRESI and REENA RAGGI, Circuit Judges, JOHN G. KOELTL,* District Judge.

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*District Judge John G. Koeltl of the United States District Court for the Southern District of New York, sitting by designation.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the March 15, 2009 judgment of the district court is AFFIRMED.

Plaintiff LinkCo, Inc. appeals from the dismissal of its complaint filed pursuant to Fed.R.Civ.P. 60(b) and 60(d) seeking relief from a judgment dismissing an earlier settled claim against defendant Fujitsu Limited for conversion, misappropriation of trade secrets, and unfair competition.[1] While we generally review a district court's grant of a Rule 12(b)(6) motion to dismiss *de novo*, *see Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009), we review its denial of a Rule 60 claim only for abuse of discretion, *see Paddington Partners v. Bouchard*, 34 F.3d 1132, 1140 (2d Cir. 1994). In doing so, we assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

We note at the outset that because LinkCo has failed specifically to challenge the dismissal of Counts Two, Three, and Four of its complaint, any such argument is waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117

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[1] In November 2002, a jury found in favor of LinkCo on the unfair competition claim and awarded it $3,500,000 in damages plus interest. The parties subsequently entered into a settlement agreement and, in April 2003, stipulated to a dismissal of the action with prejudice.

(2d Cir. 1998). Accordingly, we here consider only whether the district court properly dismissed the claim for fraud on the court alleged in Count One.

LinkCo submits that the district court erred in concluding that because Count One alleged nothing more than fraud upon an individual litigant, it provided no basis for relief from judgment under Rule 60(d). We are not persuaded. Pursuant to Rule 60(d), a court may "entertain an independent action to relieve a party from a Judgment," Fed.R.Civ.P. 60(d)(1), or "set aside a judgment for fraud on the court," Fed.R.Civ.P. 60(d)(3). To obtain equitable relief through an independent action under Rule 60(d), a claimant must "(1) show that [it has] no other available or adequate remedy; (2) demonstrate that [its] own fault, neglect, or carelessness did not create the situation for which [it] seek[s] equitable relief; and (3) establish a recognized ground – such as fraud, accident, or mistake – for the equitable relief." *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 662 (2d Cir. 1997). The type of fraud necessary to sustain an independent action attacking the finality of a judgment under Rule 60(d) "is narrower in scope than that which is sufficient for relief under Rule 60(b). *Gleason v. Jandrucko*, 860 F.2d 556, 558 (2d Cir.1988) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-46, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)). While fraud on the court can support Rule 60(d) relief, such fraud must "seriously affect[ ] the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d at 559; *accord Hadges v. Yonkers Racing Corp.*, 48 F.3d

1320, 1325 (2d Cir. 1995) (observing that such fraud "embraces only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases" (internal quotation marks omitted)). This is because Rule 60(d) actions are warranted only when necessary "to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998).

Here, the district court construed the allegations in LinkCo's complaint to suggest possible "obstruction of discovery and witness perjury." *LinkCo, Inc. v. Akikusa*, 615 F.Supp.2d 130, 137 (S.D.N.Y. 2009). It concluded that such allegations indicated "a fraud upon a single litigant – LinkCo – rather than a fraud upon the Court and ... [could not] proceed under Rule 60(d)(3)." *Id.* at 136. This conclusion does not manifest an "erroneous view of the law or ... the evidence," *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks omitted), sufficient to support a finding that the district court abused its discretion. In *Gleason v. Jandrucko*, we observed that "neither perjury nor nondisclosure, by itself, amounts to anything more than fraud involving injury to a single litigant." 860 F.2d at 560. Thus, we cannot conclude that the district court's decision not to entertain LinkCo's Rule 60(d) claim for fraud falls outside "the range of permissible decisions." *In re Sims*, 534 F.3d at 132 (internal quotation marks omitted).

LinkCo's contention that the district court abused its

discretion in finding LinkCo's claim for equitable relief barred by laches is equally unavailing. The complaint alleges that in a September 22, 2005 presentation entitled "A Conspiracy to Flaunt American Justice By Foreign Executives Right Inside [U.S.] Federal Court," LinkCo outlined for Fujitsu director Ikujiro Nonaka facts then in its possession indicating Fujitsu's concealment of the full extent of its use of LinkCo's technology and its understatement of the resulting damages. Given the alleged content of the presentation, we identify no abuse of discretion in the district court's determination that LinkCo's failure to commence suit until three years later demonstrated a lack of diligence precluding any claim for equitable relief. Although LinkCo suggests that the timeliness of its Rule 60 claim should be determined by reference to New York's six-year statute of limitations for fraud, *see* N.Y. C.P.L.R. § 213(8), this argument is wholly without merit. "Rule 213(8) governs the time for filing tort claims of fraud under state law, not the time for filing motions to vacate federal judgments due to fraud." *King v. First Am. Investigations, Inc.*, 287 F.3d 91, 94 (2d Cir. 2002).

LinkCo's contention that it "could not have discovered the fraud perpetrated by Fujitsu until after 2006, when it finally obtained the inoperable hard drive[ ] from Kanda," Appellant's Br. at 33, is not convincing given the 2005 presentation, *see Rite Aid Corp. v. Grass*, 48 A.D.3d 363, 364, 854 N.Y.S.2d 1, 2 (1st Dep't 2008) (noting that "the time a reasonably diligent plaintiff could have discovered ... fraud turns upon whether a person of ordinary intelligence possessed

knowledge of facts from which the fraud could be reasonably inferred" (internal quotation marks omitted)); *cf. Rothman v. Gregor*, 220 F.3d 81, 96-97 (2d Cir. 2000) (noting that statute of limitations on alleged securities fraud claims begins to run when reasonable investor, in exercise of reasonable diligence, should have discovered facts underlying alleged fraud). In any event, LinkCo waited more than two years after obtaining the hard drive to commence suit. LinkCo seeks to excuse its delay by noting that forensic experts had to restore the inoperable hard drive and recover some 100,000 deleted files, many of which had to be translated from Japanese to English and all of which had to be reviewed. As the district court observed, however, much of the information so obtained only duplicated that already possessed by LinkCo. We are thus not persuaded on the totality of the record that the district court abused its discretion in finding a lack of diligent pursuit of rights, and we affirm its dismissal of the claim for equitable relief.[2] *See Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127 n. 3 (2d Cir. 2009) (allowing affirmance on any ground appearing in record).

We have considered LinkCo's remaining arguments and conclude that they are without merit. Accordingly, the March 15, 2009 order of the district court is AFFIRMED.

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[2]By failing to raise the issue in its opening brief, LinkCo waived its argument that Fujitsu's unclean hands prevent Fujitsu from asserting a laches defense. *See Thomas v. Roach*, 165 F.3d 137, 145-46 (2d Cir. 1999) (holding argument first raised in reply brief waived).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[DATE STAMP]
[Illegible]
3/12/09

LINKCO, INC.,
Plaintiff,

- against -

OPINION AND ORDER
08 Civ. 8770 (SAS)

NAOYUKI AKIKUSA and FUJITSU LIMITED,
Defendants.

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

On April 15, 2003, after adjudication of the case by a jury and entry into a settlement agreement by the parties, *LinkCo v. Fujitsu*, No. 00 Civ. 7242,[1] was dismissed with prejudice pursuant to Stipulation by LinkCo and Fujitsu.[2] More than five years later, on October 14, 2008, LinkCo filed the instant action, alleging that Fujitsu and its Chief Executive Officer, Naoyuki Akikusa, engaged in a coordinated scheme to

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[1]This case will hereinafter be referred to as *LinkCo I*.

[2]Although the jury had reached a verdict in the case, the Court had not entered judgment.

defraud LinkCo and the Court during the pendency of the previous action.[3] Linkco requests that the Court (1) "void the settlement reached in the matter," (2) "set aside the voluntary dismissal," (3) "reinstate the jury verdict of liability," and (4) "grant a new trial on damages due to misappropriation of trade secrets" pursuant to "this Court's authority to entertain an independent action in equity for relief from judgment"[4] and Federal Rule of Civil Procedure Rule 60(b)(6).[5] LinkCo also brings claims of common law fraud and unjust enrichment against defendants based on the same allegations.[6] Fujitsu has filed a motion to dismiss all of LinkCo's claims on the ground that LinkCo has failed to demonstrate that it is entitled to relief under

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[3]These allegations were later amended, but not substantially changed, when Linkco filed its Amended Complaint and Second Amended Complaint on November 7, 2008 and January 15, 2009, respectively.

[4]*See* Second Amended Complaint ("SAC") ¶¶ 37-42. Although not specified in the SAC, it appears in LinkCo's papers in response to defendants' motion to dismiss that the authority to which LinkCo refers derives from Federal Rule of Civil Procedure 60(d). *See* LinkCo's Brief in Opposition to Motion to Dismiss ("LinkCo Mem.") at 5-6.

[5]*See* SAC ¶¶ 43-47. The basis for relief under both provisions is the fraud that was allegedly perpetrated by defendants during *Linkco I*.

[6]*See id.* ¶¶ 48-62.

Rule 60.[7] For the reasons that follow, Fujitsu's motion to dismiss is granted in its entirety.

II. BACKGROUND

On September 25, 2000, LinkCo commenced an action against Fujitsu alleging conversion, misappropriation of trade secrets, tortious interference with contract, unfair competition, and a state law claim.[8] LinkCo withdrew its conversion claim and state law claim prior to trial.[9] During trial, the Court granted Fujitsu judgment as a matter of law on the federal trade secret misappropriation claim and tortious interference with contract claim.[10] On November 6, 2002, the jury returned a verdict in favor of LinkCo on the remaining unfair competition claim and awarded $3,500,000 in damages.[11] The parties

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[7] Although Akikusa has appeared in this action, he does not join this motion, taking the position that, "[a]s an individual citizen of Japan, [he] has not been properly served under the Hague Convention, and has not waived service." *See* Amended Memorandum of Law in Support of Defendant Fujitsu Limited's Motion to Dismiss Plaintiff's Second Amended Complaint ("Fujitsu Mem.") at 4 n.3.

[8] *See LinkCo I* Complaint, Ex. 1 to Affidavit of Timothy Treanor, Fujitsu's Counsel ("Treanor Aff."); SAC ¶ 7.

[9] *See LinkCo I*, 230 F. Supp. 2d 492, 493 n.1 (S.D.N.Y. 2002).

[10] *See id.* at 493.

[11] *See* SAC ¶ 8.

entered into a settlement agreement on April 1, 2003.[12] The action was dismissed with prejudice by Stipulation on April 15, 2003, prior to any entry of judgment.[13]

LinkCo alleges that it later discovered, when conducting an investigation into representations made by Fujitsu and Akikusa during *LinkCo I*, that Fujitsu and Akikusa had engaged in a "massive scheme of fraud" that improperly influenced the Court and jury in their determinations and "induce[d] LinkCo into settlement."[14] Specifically, LinkCo alleges the following: (1) that Fujitsu had falsely represented that its use of LinkCo technology was being developed solely for the Japanese market when in fact it intended to market this technology internationally; (2) that Fujitsu had represented that its use of LinkCo's technology was limited to one unsuccessful and discontinued product line, @DisclosureVision, when in reality Fujitsu had launched a number of other products using that technology; (3) that one of Fujitsu's witnesses had testified that a document had been created for a November 20, 1997 meeting when it was actually created in March 1997,[15] which caused

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[12]*See id.* ¶ 9.

[13]*See* 4/15/03 Stipulation of Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1), Ex. 4 to Treanor Aff.; SAC ¶ 32.

[14]SAC ¶ 10.

[15]In another part of the SAC, LinkCo alleges that the presentation was created for a January 20, 2008 meeting. *See id.*

the jury to arrive at a diminished damages figure; and (4) that Akikusa falsely represented that he had no knowledge of @DisclosureVision until the date of Fujitsu's product announcement, even though he had been responsible for responding to "the change in reporting requirements that opened a market for products like @DisclosureVision" prior to his appointment as CEO.[16]

III. LEGAL STANDARD

A. Motion to Dismiss

In reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a court must "'accept as true all of the factual allegations contained in the complaint'"[17] and "draw all reasonable inferences in the plaintiffs favor."[18] A complaint must provide "the grounds upon which [the plaintiffs] claim rests through factual allegations sufficient 'to raise a right to relief above the

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¶ 26(d).

[16] *Id.* ¶ 12.

[17] *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1975 (2007).

[18] *Ofori-Tenkorang v. American Int'l Group, Inc.*, 460 F.3d 296, 298 (2d Cir. 2006).

speculative level'"[19] in order to survive a motion to dismiss. Although the complaint need not provide "detailed factual allegations,"[20] it must nonetheless "amplify a claim with some factual allegations ... to render the claim *plausible*."[21] "[B]ald assertions and conclusions of law will not suffice."[22]

B. Rule 60(b)

Federal Rule of Civil Procedure 60(b)(3) states: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for [ ] fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Rule 60(b)(6) allows a court to relieve a party from a final judgment based on "any other reason that justifies relief." Any motion pursuant to Rule 60(b) must be made within a "reasonable time," and in the cases of Rule 60(b)(1),

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[19] *ATSI Comme'ns v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1965). *Accord Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (per curiam) (noting that plaintiffs must "'give the defendant fair notice of what the ... claim is and the grounds upon which it rests'") (quoting *Twombly*, 127 S. Ct. at 1955).

[20] *Twombly*, 127 S. Ct. at 1970.

[21] *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 2931 (2008).

[22] *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 309 F.3d 71, 74 (2d Cir. 2002) (citation omitted).

(2), and (3), should be made within "one year after the entry of the judgment or order or the date of the proceeding."[23] "'[E]xtraordinary circumstances' are required to bring the motion within the 'other reason' language and to prevent clause (6) from being used to circumvent the [one]-year limitations period that applies to [any of the specific clauses]."[24] Thus, "[c]ontrolling cases have held that if the reasons offered for relief from judgment can be considered in one of the more specific clauses of Rule 60(b), such reasons will not justify relief under Rule 60(b)(6)."[25]

C. Rule 60(d)

Rules 60(d)(1) and (3) allow a court, respectively, to "entertain an independent action to relieve a party from a judgment, order, or proceeding" and "set aside a judgment for fraud on the court."[26]

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[23]Fed. R. Civ. P. 60(c)(1).

[24]*Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 n.11 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 613 (1949)).

[25]*United States v. International Bhd. of Teamsters*, 247 F.3d 370, 391-92 (2d Cir. 2001) (citation omitted). *Accord Liljeberg*, 486 U.S. at 863.

[26]Prior to December 1, 2007, independent actions were brought under Rule 60(b)'s savings clause instead of Rule 60(d). *See Eastern Financing Corp. v. JSC Alchevsk Iron and Steel Works*, No. 04 Civ. 8112, 2008 WL 2518700, at *19 n.21 (S.D.N.Y. June 24, 2008) (noting that prior to December 1, 2007, an action for setting aside a judgment for fraud upon the court was

The one-year limitation does not apply to actions commenced pursuant to Rule 60(d).[27] "The court exercises discretion in determining whether to entertain independent actions for relief and looks to traditional equitable principles to guide its decision."[28] To establish a right to equitable relief, a plaintiff "must (1) show that [it has] no other available or adequate remedy; (2) demonstrate that [its] own fault, neglect, or carelessness did not create the situation for which [it] seek[s] equitable relief; and (3) establish a recognized ground – such as fraud, accident, or mistake – for the equitable relief."[29] "'A party seeking to vacate a judgment in an independent action must show that permitting the judgment to stand would be

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pursuant to Rule 60(b) rather than Rule 60(d)). *See also Campaniello Imports, Ltd. v. Saporiti Italia, S.p.A.*, 117 F.3d 655, 661 (2d Cir. 1997) ("Rule 60(b)'s 'savings clause' allows 'a court to entertain an independent action to relieve a party from a judgment, order, or proceeding ... or to set aside a judgment for fraud upon the court.'") (citing Fed. R. Civ. P. 60(b)). In 2007, Rule 60 was amended stylistically and the final sentence of Rule 60(b) – allowing a judgment to be set aside by motion or independent action – was deleted. *See* 2007 Amendments to Fed. R. Civ. P. 60. As Rule 60 stands currently, independent actions are brought under Rule 60(d).

[27] *See King v. First Am. Investigations, Inc.*, 287 F.3d 91, 95 (2d Cir. 2002) (holding that plaintiffs' motion to vacate for fraud committed upon the court was not subject to the one-year limitation period).

[28] *Campaniello*, 117 F.3d at 661 (citing *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990)).

[29] *Id.* at 662 (citing *Cresswell*, 922 F.2d at 71).

a grave miscarriage of justice."[30]

"[T]he type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion."[31]

> [F]raud upon the court is limited to fraud which seriously affects the integrity of the normal process of adjudication [and] should embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.[32]

In addition, "fraud on the court involves 'far more than an injury to a single litigant' because it threatens the very integrity of the judiciary and the proper

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[30] *Manti's Transp., Inc. v. Citicapital Commercial Corp.*, No. 06 Civ. 1699,2008 WL 977192, at *5 (E.D.N.Y. Apr. 9, 2008) (quoting *Opals on Ice Lingerie v. Bodylines, Inc.*, 425 F. Supp. 2d 286,289 (E.D.N.Y. 2004)). *Accord United States* v. *Beverly*, 524 U.S. 38, 46 (1998) (holding that independent actions are available "only to prevent a grave miscarriage of justice").

[31] *Gleason v. Jandrucko*, 860 F.2d 556, 558 (2d Cir. 1988) (citations omitted).

[32] *King*, 287 F.3d at 95.

administration of justice."[33] Thus, "allegations of nondisclosure during pretrial discovery do not constitute grounds for an independent action under [Rule] 60b."[34] Moreover, "[a]fter-discovered evidence of alleged perjury by a witness [or other fabricated evidence] is [also] not sufficient for a finding of 'fraud upon the court.'"[35] In contrast, bribing a judge, tampering with a jury, and hiring an attorney for the purpose of influencing a judge are examples of fraud upon the court.[36] Finally, "'[f]raud upon the court must be established by clear and convincing evidence.'"[37]

IV. DISCUSSION[38]

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[33] *Gleason*, 860 F.2d at 559 (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)).

[34] *Id.* at 559-60 (citing *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976)).

[35] *Id.* at 559 (citing *Hazel-Atlas*, 322 U.S. at 245). *Accord Manti's Transp.*, 2008 WL 977192, at *8 (citations omitted) (holding that "witness perjury or fabricated evidence that does not involve officers of the court and that could and should have been discovered during the previous litigation is insufficient to establish fraud on the court").

[36] *See Stewart v. O'Neill*, No. 00 Civ. 8560, 2002 WL 1917888, at *2 (S.D.N.Y. Aug. 16, 2002) (citations omitted).

[37] *Manti's Transp.*, 2008 WL 977192, at *7 (quoting *King*, 287 F.3d at 95).

[38] It should be noted that although the Court drew all reasonable inferences in LankCo's favor in considering this motion, it did not attempt to translate any of the exhibits that were in

A. Rule 60(b)(6)

LinkCo asserts that it brings this action under Rule 60(b)(6) because the fraud allegedly committed by defendants was "broad and complex."[39] Presumably, LinkCo also seeks to bring this action under Rule 60(b)(6) because the one-year statute of limitations does not apply to an action brought under this Rule.[40] However, it is well-established that Rule 60(b)(6) should not be used to circumvent the one-year limitations period that applies to the specific clauses.[41] Thus, an action may not be brought under Rule 60(b)(6) if it is premised on one of the grounds for relief enumerated in the specific clauses in Rule 60(b).[42] Because the instant action alleges that Fujitsu acted fraudulently in *LinkCo I*, this action can only proceed under Rule 60(b)(3). LinkCo's failure to file this action within one year following the conclusion of *LinkCo I*

Japanese into English, *see, e.g.*, Exs. 12, 27, 37, 39 to SAC, nor did it try to decipher the meaning of any Japanese text that appears to have been machine-translated into English and does not make sense in English. *See, e.g.*, Exs. 13, 21, 46 to SAC.

[39]SAC ¶ 46.

[40]*See* Fed. R. Civ. P. 60(c)(1) (any motion brought pursuant to Rule 60(b) that is not brought under Rules 60(b)(1), (2), or (3) must be brought within a "reasonable time").

[41]*See Liljeberg*, 486 U.S. at 864 n.11 (quoting *Klapprott*, 335 U.S. at 613).

[42]*See id.* at 863. *Accord International Bhd. of Teamsters*, 247 F.3d at 391-92.

renders this action time-barred. Count II must therefore be dismissed.[43]

B. Rule 60(d)

LinkCo also requests relief pursuant to Rule 60(d), arguing that this case must be entertained as an independent action "because of a grave injustice that occurred as a result of an extraordinary, indeed, an unprecedented fraud by Fujitsu."[44] It argues that "LinkCo and the Court were induced to rely on a false timeline, [ ] false marketing information, [ ] false testimony, [ ] and false and altered documents."[45] It also contends that it could not have discovered the fraud sooner because a non-party witness had been hired by Fujitsu to assist in litigation support and this non-party had "withheld key documents from the case."[46] Finally, LinkCo alleges that "[o]ther non-party documents produced through Fujitsu were materially altered and falsified."[47] Notwithstanding these

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[43]Indeed, it appears that LinkCo acknowledges that it cannot proceed under Rule 60(b)(6), because LinkCo fails to address Fujitsu's arguments regarding this claim in its opposition papers, focusing instead on its claim under Rule 60(d). *See generally* LinkCo Mem.

[44]*Id.* at 2.

[45]*Id.*

[46]*Id.*

[47]*Id.*

allegations, I decline to allow this action to proceed under Rule 60(d).

Even after drawing all reasonable inferences in favor of LinkCo, the allegations in the Second Amended Complaint suggest nothing more than a fraud upon a single litigant – LinkCo – rather than a fraud upon the Court and therefore cannot proceed under Rule 60(d)(3). LinkCo's allegations of Fujitsu's and Akikusa's wrongdoing during *LinkCo I* can be categorized into seven groups: (1) allegations that documents should have been but were not produced to LinkCo by Fujitsu;[48] (2) allegations that answers to interrogatories either failed to disclose pertinent information or were misleading;[49] (3) allegations that

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[48] *See, e.g.*, SAC ¶ 15 (describing a document discovered by LinkCo that was not produced during *LinkCo I* even though it was created on February 20, 2001 and discusses the launch of a product named WebSERVE/Disclosure which uses LinkCo's technology); *id.* ¶ 19 (alleging that documents had been discovered that discussed or were presented at forums that took place during *LinkCo I* promoting products that Fujitsu had testified had been abandoned); *id.* ¶ 26(b) (alleging that a powerpoint presentation marketing @DisclosureVision had not been produced during *LinkCo I*); *id.* ¶ 26(c) (alleging that a presentation had been redacted when produced to LinkCo and that this redacted page had key information about Fujitsu's international plans with LinkCo's technology); *id.* ¶ 26(e) (alleging that it had been discovered that the last page of a presentation produced by Fujitsu that was redacted showed Fujitsu's relationship with a non-party who was helping it with litigation support).

[49] *See, e.g.*, *id.* ¶ 12(d) (alleging that Akikusa and Fujitsu had falsely maintained in their answers to interrogatories that

Fujitsu used various web-based tactics to hide critical information from LinkCo;[50] (4) allegations that Fujitsu had failed to identify particular persons as witnesses;[51] (5) allegations that witnesses may have given false testimony;[52] (6) allegations that a non-party assisted Fujitsu in its failure to produce relevant documents;[53]

Akikusa had no knowledge of @DisclosureVision when he did).

[50]*See, e.g., id.* ¶¶ 12(d), 20 (alleging that Fujitsu purposefully misspelled "DisclosureVision" as "DiscrosureVision" so that LinkCo would not be able to find information about the product online); *id.* ¶¶ 17-18, 21 (alleging that Fujitsu used "white text on white background" to hide text on its website; *id.* ¶¶ 19-20 (alleging Fujitsu's use of other tactics to thwart LinkCo's attempts to search the Fujitsu website).

[51]*See, e.g., id.* ¶ 26(a) (alleging that Fujitsu had failed to name two "key" witnesses).

[52]*See, e.g., id.* ¶ 16 (alleging that Fujitsu had transferred a product that it had testified during *LinkCo I* as discontinued to a third party on January 24, 2001 and then had the product transferred back at the conclusion of trial); *id.* ¶ 26(d) (alleging that an e-mail exchange between a witness and counsel suggests that the witness may have lied about the date a presentation was created in order to assist Fujitsu in the calculation of a more favorable damages figure); *id.* ¶ 26(f) (alleging that e-mail correspondence between two former LinkCo employees called as witnesses suggests that their testimony was influenced by their desire to "curry favor with Fujitsu").

[53]*See, e.g., id.* ¶¶ 27-29 (alleging that Bowne, which had been hired to help with litigation support on *LinkCo I*, had suppressed documents suggesting that Fujitsu planned to enter other Asian markets besides Japan with products using LinkCo's technology).

and (7) allegations that Fujitsu may have manipulated the machine translation of a certain Japanese document into English.[54] While LinkCo's allegations are numerous and specific, they suggest only the possibility of obstruction of discovery and witness perjury, allegations that the Second Circuit has found are insufficient for an independent action based upon a fraud on the court.[55]

In addition, there is no allegation of attorney collaboration or involvement in the alleged fraudulent scheme. The Complaint mentions Fujitsu's counsel twice. *First,* the Complaint alleges that one of Fujitsu's witnesses, Kiyoto Kanda, had been shown a powerpoint presentation that promoted @DisclosureVision's international scope by Fujitsu's counsel, but that this presentation was never produced in *LinkCo I.*[56] *Second,* the Complaint alleges that Fujitsu's counsel had engaged in an e-mail exchange with Kanda about the date of a meeting at which a particular powerpoint presentation was presented.[57]

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[54]*See, e.g., id.* ¶ 30 (alleging that Fujitsu's market projections had been incorrectly translated, making the projections seem smaller than they actually were).

[55]*See Gleason,* 860 F.2d at 559 (holding non-disclosure of evidence during pretrial discovery and after-discovered evidence of alleged witness perjury to be insufficient for a finding of fraud upon the court).

[56]*See* SAC ¶ 26(b).

[57]*See id.* ¶ 26(d).

Kanda had initially believed the November 20, 1997 date on the presentation to be "strange," but two hours later had told counsel that this was the right date, even though LinkCo later discovered that the actual date of the meeting was January 20, 1998.[58] LinkCo alleges that it was harmed by Kanda's testimony in *LinkCo I* because the November 20, 1997 date was used to calculate LinkCo's damages.[59] Had the January 20, 1998 date been used, LinkCo would have been able to establish a much higher damages figure.[60] However, these allegations – without more – do not suggest knowing misconduct by Fujitsu's counsel.[61] The

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[58] *See id.*

[59] *See id.* ¶ 12(e).

[60] *See id.*

[61] LinkCo also argues in its opposition brief that Fujitsu's counsel had paid certain non party witnesses to "Join Fujitsu's litigation team." *See* LinkCo Mem. at 8 (citing SAC ¶¶ 14, 26(f), 27-29). In addition, LinkCo contends that Fujitsu's counsel had been in direct contact with Kanda, an important Fujitsu witness. *See id.* at 9 (citing SAC ¶¶ 24, 26). However, the cited paragraphs do not even mention Fujitsu's counsel. In fact, in a presentation appended to the SAC as an exhibit that was shown to a Fujitsu outside director prior to filing this action, LinkCo states that Fujitsu's counsel did not know about Fujitsu's purported fraudulent scheme. *See* Presentation to Ikujiro Nonaka entitled "A Conspiracy to Flaunt American Justice By Foreign Executives Right Inside US Federal Court" ("Nonaka Presentation"), Ex. 36 to SAC, at 5 (noting that Fujitsu hid from its own attorneys its ongoing marketing of the central product that used LinkCo's technology).

allegations demonstrate only that Kanda may have provided false testimony.

LinkCo also relies principally on *Hazel-Atlas Glass Company v. Hartford-Empire Company* for its argument that relief is particularly warranted in this case. However, this reliance is misplaced.[62] While the Supreme Court granted relief to the plaintiff in *Hazel-Atlas*, it also emphasized two considerations that set that case apart from the instant one. *First*, the Supreme Court found particularly important that Hartford Empire had paid a well-known expert to sign a fabricated trade article in order to deceive not only the Circuit Court to deny plaintiffs request for relief, but also the Patent Office into granting its patent application.[63] The Court placed great emphasis on the

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There is one e-mail between Kanda and an individual named Leonid in which Kanda mentions that he met with Fujitsu's attorneys and that the attorneys "have a confidence that every person's talk is same, which means 'truth is one thing.'" *See* 9/12/02 e-mail from Kiyoto Kanda to "Leonid," Ex. 22 to SAC. However, the meaning of this statement is ambiguous and the Complaint does not allege that Fujitsu's counsel was involved in falsifying testimony. *See* SAC ¶ 26(f).

[62]LinkCo also relies heavily on *Fraige v. American-National Watermattress Corp.*, 996 F.2d 295 (Fed. Cir. 1993) and *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3d Cir. 1987). *See* LinkCo Mem. at 11. Needless to say, decisions from other Circuits are not binding on this Court.

[63]*See Hazel-Atlas*, 322 U.S. at 245 ("even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud [ ] the Patent

fact that the case concerned not only "private parties" but related to "issues of great moment to the public," presumably because the Patent Office was involved.[64] *Second,* the Court specifically distinguished the circumstances in the case from "a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury."[65] The Court found important that the scheme had been perpetrated not only by Hartford Empire's officials, but by its lawyers as well.[66] *Hazel-Atlas* is therefore distinguishable from this case.[67]

Office ....")

[64] *Id.* at 246.

[65] *Id.* at 245.

[66] *See id.* at 247. Indeed, the Hartford lawyer was the "true author of the spurious publication." *Id.* at 241. The second distinction was later analyzed and confirmed by the Second Circuit in *Gleason v. Jandrucko* to justify that Court's denial of a plaintiff's request that the Court grant its independent action in equity based on fraud upon the court. *See* 860 F.2d at 559 ("Proof of the scheme to defraud together with the complicity of the offending party's lawyers in *Hazel-Atlas* was, in the Court's judgment, conclusive evidence of fraud on the court.").

[67] LinkCo asks for leave to replead in order to insert additional allegations that Fujitsu's counsel hired Bowne and that it withheld documents from LinkCo. *See* 3/11/09 Letter from LinkCo ("3/11/09 Letter"). However, allegations that Fujitsu's counsel hired Bowne or that some documents were not produced do not suggest that Fujitsu's counsel knowingly collaborated with its client to defraud the Court. In any case, even assuming that

Nor can this action proceed under either Rules 60(d)(3) or 60 (d)(1) because LinkCo has failed to demonstrate that it had no adequate remedy at law or that its "fault, neglect, or carelessness did not create the situation for which [it] seek[s] equitable relief."[68] *First*, the Complaint suggests that LinkCo could have uncovered enough of Fujitsu's fraudulent scheme during *LinkCo I* or within the year thereafter to have brought it to the Court's attention or filed a Rule 60(b)(3) motion. Many of the documents discovered by LinkCo demonstrating that Fujitsu was marketing other products allegedly using LinkCo's technology were found on the Internet or could have been found in public records. LinkCo argues that it was difficult, in some cases, to find these documents because Fujitsu would misspell the names of the products or hide text.[69] However, it appears that some of the principal documents were on Fujitsu's website or in public records during the litigation and could have been

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the Complaint is deemed amended to include a claim of misconduct by Fujitsu's counsel, this would not change the outcome of this Opinion and Order because this Court finds additionally that LinkCo has failed to show that it had no adequate remedies at law or that its own neglect was not the cause of its predicament. *See infra*.

[68] *Campaniello*, 117 F.3d at 662 (citation omitted). "[I]t is fundamental that equity will not grant relief if the complaining party 'has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action ... to open, vacate, modify, or otherwise obtain relief against, the judgment.'" *Id.* (quoting *Cresswell*, 922 F.2d at 71).

[69] *See* SAC ¶¶ 17, 20.

discovered with more diligence.

For instance, the Complaint alleges that Israel-Rosen discovered a document promoting WebSERVE/Disclosure that used the @DisclosureVision "concept and architecture" on the Fujitsu website and further alleges that the document was created on February 20, 2001, suggesting it was likely posted on the website during *LinkCo I*.[70] LinkCo alleges that it also uncovered a March 31, 1999 Fujitsu press release that maintains that its "@DisclosureVision system [sales] will total 15 billion through 2002," projections that are contrary to Fujitsu's testimony that the product was "defunct and had only $300,000 of sales."[71] This press release should have been obtainable in public records or on Fujitsu's website prior to and during *LinkCo I*. Discovery of these two documents would have not only shown that Fujitsu was developing other products with the use of LinkCo's technology but also that the @DisclosureVision sales projections put forth by Fujitsu's witnesses were false or misleading. Together, the documents may have demonstrated that the damages sought by LinkCo should be higher.

The Complaint also alleges that Fujitsu used certain web-based tactics to conceal crucial information from LinkCo in *LinkCo I*. Such alleged tactics included the use of white text on white

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[70] *See id.* ¶ 15.

[71] *See* Nonaka Presentation at 17.

background on Fujitsu's website and the manipulation of machine translations from Japanese to English.[72] However, LinkCo does not explain why it was not able to uncover these purported ploys during *LinkCo I* or within a year thereafter. For instance, LinkCo provides an example of Fujitsu's use of white text on white background as an exhibit to the Complaint.[73] The document shows how the web page looked prior to the discovery of the white text.[74] The first sentence on the page begins on the right side of the page, and there is a clear gap in the middle of the paragraph.[75] It would have been difficult to make sense of this web page with the gap, and it is hard to believe that a person viewing the web page would not have questioned whether there was missing text on these pages.

LinkCo also alleges that Fujitsu overrode some machine translations in order to dupe LinkCo into believing its market projections for products using LinkCo's technology were smaller than they actually were.[76] However, LinkCo similarly fails to explain why it could not have discovered Fujitsu's trickery in *LinkCo I* or in the year thereafter. Considering that

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[72] *See* SAC ¶¶ 17-18, 21, 30.

[73] *See* "White on White" Example, Ex. 13 to SAC.

[74] *See id.*

[75] *See id.*

[76] *See* SAC ¶ 30.

LinkCo's calculation of damages were undoubtedly based in part on these market projections, LinkCo would have been wise to request the original document and then perform an independent translation of that document. LinkCo provides no explanation for why it failed to conduct a more thorough investigation even though these "tactics" could have been easily uncovered during *LinkCo I* or within a year thereafter with a little due diligence.

Second, the Complaint alleges that LinkCo actually began investigating Fujitsu's purported manipulation of the litigation process in *LinkCo I* soon after dismissal of the case. The Complaint alleges that in December 2003, Daniel R. Rizzolo, an employee of Bowne Business Solutions, had drunkenly informed LinkCo's principal, David Israel-Rosen, that he and Bowne had been involved as litigation support for Fujitsu even though he believed "this involvement presented some kind of conflict or was improper."[77] This conversation apparently instigated the

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[77] *Id.* ¶ 14. Although the relationship between Fujitsu and Bowne is unclear from the Complaint, it appears that Bowne may have been interested in collaborating with Fujitsu on its disclosure services business. *See* 1/16/98 e-mail from Kanda to Ajit Kambil, Ex. 29 to SAC ("I contacted the company named "Bowne" in New York .... Since Bowne is one of the famous financial printers in the States and has [ ] experience in the field of EDGAR filing for years, the business relationship with Fujitsu is going to be [ ] a good solution for them to get into the Japanese market.").

investigation into Fujitsu's purported misconduct.[78] Indeed, in January 2004, presumably through the efforts of Israel-Rosen, a presentation marketing eIRM – a product identical to @DisclosureVision that had not been disclosed by Fujitsu – was uncovered, further alerting Israel-Rosen and LinkCo to the possibility that Fujitsu had failed to properly discharge its discovery obligations.[79]

LinkCo failed to bring a 60(b)(3) motion when it already harbored suspicions at the time that Fujitsu may have engaged in litigation misconduct. Surely, LinkCo had enough evidence or could have accumulated enough evidence of fraud in April 2004. LinkCo should not now complain that it had no opportunity to uncover the fraud when the Complaint itself alleges it had reason to know Fujitsu had not acted properly as early as the end of 2003.[80]

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[78]*See id.* ¶ 15 (alleging that after this conversation, "Israel-Rosen started on the road that led to the discovery of the Bowne-Fujitsu collusion").

[79]*See* Nonaka Presentation at 6 (indicating that in January 2004, LinkCo had "[d]iscover[ed] [an] eIRM presentation showing eIRM is identical to @DisclosureVision").

[80]Similarly, in *Gleason*, the Second Circuit found it particularly persuasive that the plaintiff had an opportunity in the prior proceeding to contest the evidence and uncover the alleged fraud. *See* 860 F.2d at 559 (distinguishing the circumstances of the case from those in which fraud had prevented a creditor from proceeding against the garnishee of the debtor's assets in the first place based on the garnishee's false representation) (citing *Leber-Krebs, Inc. v. Capital Records*, 779

Even if LinkCo did not believe it had grounds to bring suspicions of Fujitsu's alleged fraud to the Court's attention prior to the deadline to file a Rule 60(b)(3) motion, it should have had sufficient information by September 22, 2005, when LinkCo presented all of the evidence it had found up to that date to one of Fujitsu's outside directors, Ikujiro Nonaka.[81] LinkCo argues that the presentation only shows the possibility of "internet trickery" and that LinkCo would have run afoul of its Rule 11 obligations if it had brought an action then.[82] This characterization, however, is disingenuous.

The presentation – totaling 27 pages and entitled "A Conspiracy to Flaunt American Justice By Foreign Executives Right Inside US Federal Court" – details Fujitsu's alleged tactics to avoid its discovery obligations.[83] In addition, the presentation lists the documents LinkCo had found that contradicted Fujitsu's testimony about the lack of success of

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F.2d 895 (2d Cir. 1985)). *See also Campaniello*, 117 F.3d at 662-63 ("Having failed to take advantage of the adequate remedy at law offered by Rule 60(b)(3), appellants may not now seek relief in equity.").

[81] *See* SAC ¶ 22.

[82] *See* 3/11/09 Letter at 2.

[83] *See generally* Nonaka Presentation.

@DisclosureVision[84] and the non-existence of other similar products.[85] The presentation also alleges that Akikusa may not have been forthright about his knowledge about @DisclosureVision.[86] These 2005 allegations are the same central allegations that LinkCo asserts in its Complaint.

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[84] *See, e.g., id.* at 3 ("Facts now demonstrate that Fujitsu hid the considerable revenues and ongoing development in their pursuit of a very large market"); *id.* at 5 ("Fujitsu hid the central business (one they claimed in a pre-law suit press release would be worth 15 Billion Yen through the first 3 years ending 2002)); *id.* at 17 ("Fujitsu ... deceived the ... Court and the plaintiffs throughout the trial process into believing that the Intellectual Property (IP) they stole ... was defunct and had only $300,000 of sales").

[85] *See, e.g., id.* at 4 (listing the different names of disclosure products of which LinkCo was aware); *id.* at 5 ("Fujitsu hid the business ... putting products in subsidiaries ... changing names."); *id.* at 7 (alleging that Fujitsu failed to issue a press release announcing eIRM, another disclosure product, and "avoided trade-marking product names which is standard practice").

[86] *See id.* at 7 ("President gets every @DisclosureVision trip report while denying knowing of @DisclosureVision"). The Complaint also alleges that in late 2004, Israel-Rosen, after "many months of searching," discovered a document created in 2001 while *LinkCo I* was being litigated that discussed the launch of a produce called WebSERVE/Disclosure that also used LinkCo's technology. *See* SAC ¶ 15. This product had apparently not been known to LinkCo at the time of the *LinkCo I* trial. *See id.* ¶ 12(b). He further stumbled upon Fujitsu's use of white text on white background on its website around the same time. *See id.* ¶ 17; Affidavit of David Israel-Rosen, Ex. 18 to SAC, ¶ 8 (attesting that he had inadvertently discovered hidden text on Fujitsu's website in late 2004 when he fell asleep at his computer).

LinkCo contends that it was not until the "translation of the Kanda computers and documents and Bowne's later admission that it suppressed evidence" in 2006 and 2007 that it was able to bring this action.[87] However, the evidence uncovered in those two years did not significantly change the serious allegations LinkCo had already asserted against Fujitsu in 2005 and upon which LinkCo builds this case. Indeed, most of the evidence LinkCo alleges it found on Kanda's computer merely supports its allegation – which it had already called to Nonaka's attention in 2005 – that Fujitsu had hidden the success of @DisclosureVision and its plans to market that product internationally.[88] And, as discussed, LinkCo was apprised about possible misconduct by Bowne in 2003.[89]

LinkCo argues additionally that the defense of laches should not be resolved on a motion to dismiss.[90] While this is the general rule, it has also been held in this district and Circuit that the defense of laches may be resolved on a motion to dismiss where it is clear on the face of the Complaint that "the plaintiff can prove

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[87] *See* 3/11/09 Letter at 2.

[88] *See* SAC ¶ 26.

[89] *See id.* ¶ 14.

[90] *See* LinkCo Mem. at 15-17; 3/11/09 Letter at 3-4.

no set of facts to avoid the insuperable bar."[91] There is no doubt that LinkCo itself believed it had amassed enough information to bring Fujitsu's alleged fraud to the attention of Nonaka in September 2005. I am therefore hard-pressed to allow this action to proceed. Had LinkCo brought this action at that time under Rule 60(d)(1), this Court may have exercised its discretion to grant the requested relief. LinkCo decided instead to wait another three years. Such delay was inexcusable. Res judicata is intended to ensure finality in cases.[92] Allowing this action to proceed would not only be greatly prejudicial to Fujitsu, but also to this Court, which expended much time and effort bringing *LinkCo I* to a close. I therefore decline to exercise my discretion to entertain this action pursuant to Rule 60(d). Count I must therefore be dismissed.

C. Common Law Fraud and Unjust Enrichment

Counts III and IV – LinkCo's common law fraud

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[91] *Societe Des Bains De Mer Et Du Cercle Des Etrangers a Monaco v. MGM Mirage*, No. 08 Civ. 3157, 2008 WL 4974800, at *5 (S.D.N.Y. Nov. 24, 2008). *Accord Young v. Southern Pac. Co.*, 34 F.2d 135,137 (2d Cir. 1929) (... "it was well settled that when it appeared on the face of a bill of complaint that the plaintiff was guilty of laches, a demurrer would lie.").

[92] *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) ("Res judicata ensures the finality of decisions ... [it] encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes.").

and unjust enrichment claims – request compensatory damages, punitive damages, a Court order that defendants make restitution to LinkCo, and any other relief that this Court "deems necessary and just" for the fraudulent conduct engaged in by Fujitsu during *LinkCo I*.[93] Litigation of these claims would necessarily require relitigation of *LinkCo I*, which is barred by the doctrine of res judicata,[94] absent this Court's granting of relief to set aside the *LinkCo I* judgment pursuant to either Rule 60(b) or Rule 60(d). Because I have decided that LinkCo cannot proceed under either Rule 60(b) or Rule 60(d), LinkCo's claims for common law fraud and unjust enrichment must also fail.[95] Counts III and IV are therefore also dismissed.

V. CONCLUSION

For the reasons stated above, Fujitsu's motion to dismiss is granted in its entirety with prejudice. Although Akikusa does not join Fujitsu's motion to dismiss, the granting of this motion also forecloses LinkCo's claims against Akikusa. The Clerk of the Court is directed to close this motion (document no. 22) and this case.

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[93] *See* SAC, Prayer for Relief for Count III and Count IV.

[94] *See Marvel Character, Inc. v. Simon*, 310 F 3d 280, 287 (2d Cir. 2002) ("It is clear that a dismissal, with prejudice, arising out of a settlement agreement operates as a final judgment for res judicata purposes.").

[95] This does not bar LinkCo from bringing claims that are not based on issues litigated in *LinkCo I*.

SO ORDERED

/s/
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
March 12, 2009

- Appearances -

For Linkco:

Peter Thomas Shapiro, Esq.
Gregory Seth Glickman, Esq.
Lewis Brisbois Bisgaard & Smith LLP
199 Water Street, 25th Floor
New York, NY 10038
(212) 232-1322

Linda E. Unger, Esq.
Siobhan M. Murphy, Esq.
Lewis Brisbois Bisgaard & Smith LLP
660 West Adams Street
Suite 300
Chicago, IL 60661
(312) 345-1718

For Defendants Akikusa and Fujitsu:

Timothy J. Treanor, Esq.
Michael D. Mann, Esq.

Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5837

Paul E. Veith, Esq.
Richard John O'Brien, Esq.
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LINKCO, INC.,
Plaintiff,

-against-

08 CIVIL 8770 (SAS)
JUDGMENT

NAOYUKI AKIKUSA and FUJITSU LIMITED,
Defendants.

Whereas the above-caption action having come before this Court, and the matter having come before the Honorable Shira A. Scheindlin, United States District Judge, and the Court, on March 12, 2009, having rendered its Opinion and Order granting Fujitsu's motion to dismiss in its entirety with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated March 12, 2009, Fujitsu's motion to dismiss is granted in its entirety with prejudice; although, Akikusa does not join Fujitsu's motion to dismiss, the granting of this motion also forecloses Linkco's claims against Akikusa; accordingly, the case

is closed.

Dated: New York, New York
March 15, 2009

J. MICHAEL McMAHON
Clerk of Court
BY: /s/
Deputy Clerk

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